IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

COMPANY PETITION NO.64 OF 2007

In the matter of Scheme of Arrangement and Amalgamation between YOU Telecom India Private Limited and YOU Broadband Networks India Private Limited

YOU Telecom India Private Limited ..Petitioner.

WITH
COMPANY PETITION NO.65 OF 2007

In the matter of Scheme of Arrangement and Amalgamation between YOU Telecom India Private Limited and YOU Broadband Networks India Private Limited

YOU Broadband Networks
India Private Limited ..Petitioner.

...

Mr. Hemant Sethi for the Petitioner.
Mr. C.J. Joy with Ms. Rutuja Ambekar for the Regional Director.
Mr. J.S. Kini for Power Grid Corpn.
Ms. K.V. Gautam, Dy. Official Liquidator present.

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CORAM: **DR. D.Y. CHANDRACHUD, J.**

11th April, 2007.

ORAL JUDGMENT :

1. The sanction of the Court is sought to a scheme of amalgamation under Sections 391 to 394 of the Companies Act, 1956. The transferor is the Petitioner before the Court in Company

Petition 64 of 2007 while the transferee is the Petitioner in Company Petition 65 of 2007. The scheme of amalgamation contemplates the amalgamation of the transferor with the transferee together with the assets and liabilities. The shareholders of the transferor are to be allotted shares in the transferee in accordance with an exchange ratio which has been agreed upon by the shareholders. The Court has been informed that both the transferor and the transferee have two shareholders each who have granted their consent to the scheme of amalgamation. The only shareholder of non-cumulative redeemable preference shares in the transferor has also granted his consent. In both the Company Petitions, notices were undertaken to be furnished to the secured creditors. The Court has been informed that this was done and an affidavit of service has been filed. Both the transferor and the transferee are in the same line of business. The scheme of amalgamation has been envisaged in the commercial interest of the two companies.

2. Two objections have been preferred on behalf of the Regional Director which are set out in an affidavit dated 29th March, 2007. The objections are as follows :

> "(a) As per clause 6 of the Scheme, the name of the transferee company shall be changed from 'YOU Broadband Networks India Private Limited' to 'YOU Telecom India Private Limited'. Hence the transferee company may be directed to comply with the provisions of section 21 in respect of filing of necessary forms with the Registrar of Companies.
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> (b) As per clause 8.1 of the Scheme, upon sanction of this Scheme, the authorized share capital of the transferee company shall automatically stand increased without any further act or deed on the part of the transferee company, including payment of stamp duty and ROC fees. Hence the transferee company may be directed to comply with the provisions of 94/97 in respect of filing of necessary forms with the Registrar of Companies."

3. The Regional Director has, however, stated that save as aforesaid the scheme is not prejudicial to the interest of the creditors, shareholders or public. The two objections can now be taken up for consideration.

4. The provisions of Sections 391 to 394 of the Companies

Act, 1956 were construed in a judgment of the Gujarat High Court in **Maneckchowk and Ahmedabad Manufacturing Company Limited**[1]. The proposed scheme envisaged a reorganization of the share capital including a reduction of capital and an objection was received to the effect that the Companies Act, 1956 envisaged a distinct procedure for effecting a reduction or as the case may be an increase in capital which was required to be independently followed. Hence, it was urged that it was not open to the Court to sanction a scheme involving a reduction or increase of share capital in the exercise of powers under Section 394 of the Act. The Gujarat High Court held that Section 391 was a complete code which provided for the sanctioning of a scheme of compromise and arrangement. Rule 85 of the Companies (Court) Rules, 1959 specifically prescribes the procedure required to be followed where a proposed compromise involved a reduction of capital. Save and except for a situation envisaged in Rule 85, Section 391 was constituted as a separate and complete code in itself. The Gujarat High Court held thus :

> "If section 391 was subject to other provisions of the Act, every time the scheme of compromise and arrangement is put forth for the sanction of the Court, if it

1 (1970) 40 Comp. Cases 819.

> includes things for which specific provisions are made and that will have to be gone through before the scheme is sanctioned, it would result in unnecessary duplication of procedure and would be cumbersome. On the contrary, it appears that if the creditors and members of the company arrive at a certain compromise which the court considers fair, it can be sanctioned under section 391 despite the fact that for some of those things included in the compromise another procedure is prescribed in the Companies Act and which has not been carried out. It, therefore, appears that section 391 is a complete code which provides for sanctioning of the scheme of compromise and arrangement."

A similar view was taken in this Court by Mrs. Justice Sujata Manohar (as the Learned Judge then was) in **Vasant Investment Corporation Ltd. V. Official Liquidator, Colaba Land Mill Company Ltd.**[2]. The Learned Judge held that except for a reduction of share capital which requires a special procedure to be followed under Rule 85, the procedure for carrying out alterations in the Memorandum and Articles of Association of a company prescribed by other provisions of the Companies Act, 1956 is not required to be followed before a scheme is sanctioned :

> "The whole purpose of section 391 is to reconstitute the

2 (1981) 51 Comp. Cases 20

> company without the company being required to make a number of applications under the Companies Act for various alterations which may be required in its memorandum and articles of association for functioning as a reconstituted company under the scheme."

These judgments were cited with approval in a judgment of Mr. Justice B.N. Srikrishna (as he then was) in the case of **PMP Auto Industries Ltd**.[3] Summarizing the position in law, the Learned Judge held as follows :

> "Section 391 invests the court with powers to approve or sanction a scheme of amalgamation/ arrangement which is for the benefit of the company. In doing so, if there are any other things which, for effectuation, require a special procedure to be followed – except reduction of capital – then the court has powers to sanction them while sanctioning the scheme itself. It would not be necessary for the company to resort to other provisions of the Companies Act or to follow other procedures prescribed for bringing about the changes requisite for effectively implementing the scheme which is sanctioned by the court. Not only is section 391 a complete code as held by the courts, but, in my view, it is intended to be in the nature of a "single window clearance" system to ensure that the parties are not put to avoidable, unnecessary and cumbersome procedure of making repeated applications to the court for various other alterations or changes which might be needed effectively to implement the sanctioned scheme whose overall fairness and feasibility has been judged by the court under section 394 of the Act."

3 1994 Vol.80 Comp. Cases 289.

5. The same view has been reiterated in judgments of several High Courts. In the case of **Saboo Leasing Pvt. Ltd.**[4], the Andhra Pradesh High Court held that the requirement of the notice to be furnished to the Registrar under Sections 95 and 97 of the Companies Act, 1956 was duly fulfilled when a certified copy of an order sanctioning a scheme under Sections 391 to 394 was filed by the Registrar. The Andhra Pradesh High Court held thus :

> "Well, when the certified copy of the order sanctioning the scheme by this court is required to be filed before the Registrar for the purpose of its registration, there is no reason as to why it shall not be treated as notice to the Registrar as envisaged under sections 95 and 97 of the Companies Act. Inasmuch as, as discussed hereinabove, the object being the same, the necessary changes that are required to be made in the concerned register by the Registrar of Companies can be effected after receiving the certified copy of the order of this court sanctioning the scheme. The sanction of the scheme by this court has its own effect. It is not a mere act of the parties individually and volitionally. The scheme upon being sanctioned by this court, it becomes operational by virtue of the orders passed by this court. In other words, by operation of law, such changes would come into effect. Therefore, it has statutory genesis and statutory character, but not mere individual acts of the companies. In that view of the matter, no separate notice informing the Registrar under section 95 or 97 of the Companies Act need be given, unlike the other cases which do not require the sanctions of the court, in my

4 2003 Vol. 117 Comp. Cases 728.

> considered view, inasmuch as the scheme is required to be sanctioned by this court and such sanction is required to be registered with the Registrar of Companies by filing the certified copy of the order of this court."

6. In the case of **Hotline Hol Celdings Pvt. Ltd.**[5] Mr. Justice A.K. Sikri of the Delhi High Court followed the decision of the Andhra Pradesh High Court while considering an objection of the Regional Director to the effect that the authorized share capital of the merged company was being increased as a result of the scheme of amalgamation and this could only be carried out after following the procedure prescribed by the relevant provisions of the Companies Act and payment of fees to the Registrar of companies. Rejecting the contention, the Learned Judge held thus :

> "This contention is ill founded. In case of a merger like this where it is provided that the share capital of the transferor companies become the authorised capital of the transferee company, no such payment of fee to the Registrar of Companies or stamp duty to the State Government is payable."

7. In the judgment of the Allahabad High Court in the case of

5 (2005) 127 Comp Cases 165.

Jaypee Cement Limited[6] an objection of the Central Government was again that upon merger the authorized share capital of the transferee company was being combined with the authorized share capital of the transferor. This according to the Regional Director amounted to an increase in the authorized share capital of the transferee which could not be effected without paying the requisite fee to the Government. On the other hand, it was urged on behalf of the company that the requisite fee had already been paid on the authorized capital of the transferor and merely because of its merger with the transferee, there was no reason why the same fee should be paid again on the same authorized capital. The submission urged on behalf of the company was accepted and the judgment followed the view taken by Mrs. Justice Sujata Manohar in **Vasant Investment** and the judgment of Mr. Justice B.N. Srikrishna in **PMP Auto Industries** (supra):

> "The submission has force and no good reason has been shown why the two merged companies should be required to pay duty again on the same authorised capital on which duty has already been paid by the JPI.
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> 45. Regarding the increase of authorised share capital by merger of the authorised capitals of the two

6 (2004) 62 CLA 329.

> companies, an order can be passed under section 391 of the Act itself. This has been laid down by the Bombay High Court in the case of Vasant Investment Corporation Ltd. v. Official Liquidator, reported in (1981) 51 Comp Cas 20)."

8. In the case of **Jaypee Greens Ltd.**[7], a Learned Single Judge of the Allahabad High Court has reiterated the same principle holding that where a combined authorized capital of the amalgamated company does not exceed the authorized capital of the transferor and the transferee, no separate procedure for such merger of authorized share capital is required to be followed nor is any further fee liable to be paid. The judgment of the Punjab and Haryana High Court in the case of **Motorola India (P) Ltd.**[8] follows the same principle. In so far as the aspect of stamp duty is concerned, counsel appearing for the Petitioners has fairly stated that the stamp duty as required by the provisions of the Bombay Stamp Act will have to be paid. The only judgment in the long line of authorities which seems to take a different position is the judgment of Mr. Justice R.J. Kochar of this Court in **Anmol Trading Co. Limited v. Shaily Engineering Plastics Ltd.**[9]**.** In

7 (2006) 134 Comp. Cases 542.
8 (2006) 73 CLA 1.
9 2003 Vol. 113 Comp. Cases 107.

that case, the Learned Single Judge held that Sections 391 to 394 do not stipulate that where the share capital of the transferee company is to be increased, that it would not be necessary to comply with Section 97 of the Act. From the judgment of the Learned Single Judge it is, however, clear that the attention of the Court was not drawn to the consistent position of law laid down in the judgments of Mrs. Justice Sujata Manohar in **Vasant Investment** and Mr. Justice B.N. Srikrishna in **PMP Auto Industries(supra)** which have been followed in the judgments of the Andhra Pradesh, Delhi, Allahabd and Punjab and Haryana High Courts noted above. The same view, as noted earlier, has been reiterated by the Gujarat High Court.

9. The objection of the Regional Director that the name of the transferee company is to be changed and therefore a separate compliance with Section 21 in respect of the filing of necessary forms with the Registrar of Companies is mandatory, will not survive in view of the law laid down in **Vasant Investment** and **PMP Auto Industries**. The furnishing of a notice to the Registrar of the scheme as sanctioned will in any case constitute substantial compliance with the

provisions of Section 21. The objection in respect of the filing of the necessary forms with the Registrar of Companies under Sections 96/97 of the Companies Act, 1956 is answered on the basis of the same principle. In so far as the payment of stamp duty is concerned, it has been already stated before the Court that the provisions of the Bombay Stamp Act mandating the payment of stamp duty are being duly complied with. No separate payment of fees to the Registrar of Companies is warranted. The authorized share capital of the transferee is but an amalgam of the authorized capital of the transferor and the transferee upon which requisite fees have already been paid. There is therefore no occasion for the payment of a separate set of fees.

10. From the narration of facts it has emerged that all the requisite statutory compliances have been duly fulfilled. There is no other objection to the scheme save and except for the two objections of the Regional Director which have been dealt with hereinabove. The scheme is not prejudicial to the shareholders, creditors or the members of the public. In the circumstances, there is no reason why

the scheme should not be sanctioned. The Company Petitions are accordingly made absolute in terms of prayer clause (a).

11. The Petitioner to pay costs of Rs.2,500/- each to the Regional Director and the Official Liquidator within four weeks.

12. Filing and issuance of drawn up order is dispensed with.

All authorities concerned to act on an authenticated copy of this order issued by the office of this Court.